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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
Amendment of the Commission's)
Rules to Establish New)
Personal Communications)
Services)

GEN Docket No. 90-314

To The Commission:

**REPLY COMMENTS OF THE
FEDERAL COMMUNICATIONS BAR ASSOCIATION**

The Federal Communications Bar Association^{1/} hereby replies to the various Oppositions and Responses to Petitions for Reconsideration in the above-referenced proceeding which have dealt with the use of Rand-McNally & Co ("Rand-McNally") designations as the method by which the Commission has chosen to describe its PCS service areas. The FCBA's primary interest in such matters is to assist the Commission in providing fairness and efficiency in the development of communications policies and methods for effectuating its spectrum licensing responsibilities. In the case of PCS, the FCBA believes that the use of a non-government entity's proprietary designations of markets will be both inefficient and costly to the public and therefore not in

^{1/} The FCBA is a District of Columbia non-profit, non-stock corporation originally founded in 1936. Its voting membership is comprised of more than 1,800 lawyers presently and previously involved in communications law practice. As with any association, the views expressed in this Response do not necessarily represent the views of each and every member of the FCBA. Moreover, although FCC employees constitute a portion of the FCBA's membership and are represented on the FCBA's Executive Committee and its Land Mobile Practice Committee, those members did not participate in the preparation or Executive Committee consideration of this Response.

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the public interest. The FCBA urges reconsideration of this approach in favor of the adoption of a more generic county-by-county listing of market service areas.^{2/}

In both the Narrowband and Broadband PCS orders, the Commission established licensing service areas primarily on the basis of the Rand-McNally designations of Major Trading Areas ("MTAs") and Basic Trading Areas ("BTAs").^{3/} Although each of the MTAs and BTAs is defined by county boundaries, the Commission chose to specify the Rand-McNally groupings in setting the license areas. Unfortunately, as several of the Petitions for Reconsideration suggested^{4/}, and the Oppositions and Responses confirm^{5/}, the use of Rand-McNally designations for the service areas could increase the cost and impede the efficiency of developing PCS license proposals.

^{2/} The FCBA's comments are limited to the method by which the FCC denominates service areas; these comments do not consider (and the FCBA has not taken any position on) whether the use of MTAs or BTAs, as opposed for example to RSAs and MSAs or some other geographic orientation, is the appropriate designation of market boundaries.

^{3/} In a few cases, the Commission altered slightly the designations established by Rand-McNally, resulting in the creation of additional MTAs and BTAs.

^{4/} See e.g., Petitions for Reconsideration filed by TELOCATOR, at p. 16; Utilities Telecommunications Council, at p. 21; National Telephone Cooperative Association, at p. 3; Point Communications Co, at p. 4

^{5/} See, e.g., Oppositions and Responses of Telocator, at pages 19-20; GTE, at pages 13-14; Association of Independent Designated Entities, at pages 9-15; Hill & Welch; MCI, at page 7; Pacific Bell, at pages 6-8; and the Utilities Telecommunications Council, at pages 19-20

The FCBA urges the Commission instead to specify license areas by listing the counties included in each license area, rather than on the basis of a Rand-McNally BTA or MTA designation. This is the way that the agency specified its Rural Service Areas. The designations provided in Exhibit C to the Telocator Petition for Reconsideration provide the basis for such listing, which can be readily published in the Code of Federal Regulations.

This approach will have several significant benefits. First, it will allow all members of the public equal access to the information at reasonable cost. For a time, Rand-McNally was unable to meet the incredible demand for its BTA/MTA maps that ensued from the announcement that BTAs and MTAs would be the basis for the PCS service areas. Once the auction rules are published and reconsideration in this proceeding is completed, a similar rush could create supply problems again.

Those who have obtained the requisite information have done so at substantial cost and inconvenience.^{6/} Moreover, Rand-McNally has now confirmed in its January 3, 1994 "Comments" in this proceeding that it intends to require "resellers and repackagers" to pay both an upfront and residual fee, while

^{6/} Potential Rand-McNally customers had been advised to await a 1994 printing of the Rand-McNally publication; there was no assurance, however, that the designations of MTAs and BTAs contained in that newer version would be identical to those contained in the 1992 version on which the FCC's rules are apparently based, creating uncertainty as to the impact of Rand-McNally's changes in the designations over time. Publication of the county lists in the Code of Federal Regulations will avoid any such uncertainty.

imposing upon "end users" complex restrictions upon the use of information purchased from Rand-McNally dealing with the MTA/BTA for reproduction, resale or the creation of derivative works (i.e., system plans, application preparation and consulting).^{7/}

There is no need to give any one company such power. The Commission can instead identify each market by state name and number, much as it created and then published the list of RSAs, assigning each county to one of the PCS markets. And the Commission would not be violating any copyright protection to which Rand-McNally may be entitled in basing its designations on the information contained in the MTA-BTA listing.^{8/} In that

^{7/} The six-page summary of Rand-McNally's proposal to the Commission for circumstances by which that company will allow the use of the MTA/BTA designations for PCS -- and perhaps for other services, upon Rand-McNally's approval -- confirms the difficulties that will be faced by many potential applicants even in obtaining this most basic of information concerning the license coverage areas. Given the potential for such fees, the uncertainty as to when they may be assessed, and the restrictions, if any, that may be imposed on the use of information received from Rand-McNally upon payment of some level of fees, the FCBA is concerned that small businesses may be loathe to get involved in an industry in which the potential for copyright infringement, or the cost to avoid it, creates practical procedural roadblocks to success.

^{8/} As several Petitioners and respondents have already noted, one cannot claim copyright protection of ideas, but only for particular expressions of ideas. In the case of MTAs and BTAs, Rand-McNally may be able to claim a copyright in the specific maps it has produced that graphically depict MTAs and BTAs. It cannot, however, claim a copyright in the notion that certain counties should be grouped in particular BTAs and MTAs. That is an idea that is simply not subject to copyright protection. There is only one way to express that idea -- by compiling a list of counties contained in each BTA and a list of all BTAs contained in each MTA. Under the copyright doctrine of merger, this utilitarian
(continued...)

regard, the FCBA agrees with those who have urged the Commission to utilize as the primary basis for its designations the Rand-McNally BTAs and MTAs as they appear in the 1992 Rand-McNally version.^{9/}

Even if the Commission does not take a position on whether Rand-McNally has a copyright interest in the compilation of counties contained in each BTA, it need not refrain from publishing the list contained in the Appendix to Telocator's Petition. The Commission routinely publishes and references in its rules documents in which other entities may claim a copyright (see, e.g., Sections 68.316 and Section 73.3555(d)(3)(i) of the FCC's Rules). At the very least, by publishing in the rules the

^{8/} (...continued)

expression merges into the idea of which counties are contained in each area, and that expression is thus not copyrightable. See, e.g., BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing Inc. 998 F.2d 1436, 1441 (11th Cir., 1993); Kern River Gas Transmission Co. v. Coastal Corp. 889 F.2d 1458, 1464 (5th Cir., 1990) (finding the depiction of ideas on maps not copyrightable); Matthew Bender & Co. v. Kluwer Law Book Publishers 672 F. Supp 107 (S.D.N.Y. 1987).

^{9/} Rand-McNally's reliance on Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991) is misplaced. In Feist, the Court reaffirmed the concept that facts and ideas are not copyrightable and then noted that "no matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking . . . [and] may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or propose the ideas." (Id. at 349). The Commission has even modified the Rand-McNally compilation in several ways, clearly using the ideas in a totally appropriate fashion, free from any copyright that Rand-McNally may otherwise claim.

service area, be they designated as MTAs and BTAs or by some other nomenclature, into which each county falls, a substantially greater portion of the interested public -- who do not need the demographic and other data contained in the Rand-McNally publication -- will have access to these listings without the burden of payment to Rand-McNally.^{10/}

^{10/} Rand-McNally's "offer" to give the Commission a copyrighted list of such information for including in its public files, which list may not be reproduced in any form or fashion hardly serves the public interest requirements. The FCBA's geographically diverse membership, residing in more than 30 states, fully evidences that placement in the Washington, D.C. offices of the Commission simply does not constitute "public access" for interested members of the public.

For these reasons, the FCBA strongly supports those who have urged the Commission to use a more generic description of service areas on a county-by-county basis.

Respectfully submitted,

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